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In the Supreme Court of the United States

OCTOBER TERM, 1987

OKLAHOMA TAX COMMISSION, PETITIONER

v.

MUSCOGEE (CREEK) NATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to submit the views of the United States.

STATEMENT

1. This case concerns the application of the Oklahoma sales tax to high stakes bingo games operated by the Muscogee (Creek) Nation, a federally recognized Indian tribe. The bingo operation (Creek Nation Bingo) is located on a tribally-owned tract of land (the Mackey site) along the Arkansas River in Tulsa County, Oklahoma. Creek Nation Bingo is controlled and supervised by the Muscogee (Creek) Public Gaming Commissioner in accordance with a comprehensive gaming ordinance enacted by the Tribe. Creek Nation Bingo is operated by Indian Country, U.S.A., Inc. (ICUSA, Inc.), a non-Indian cor-

poration, under a management agreement approved by the Creek Nation and the Bureau of Indian Affairs.[1]

2. The Creek Nation was forcibly removed in the 1830's from its original homeland in the southeastern United States to what is now the eastern portion of the State of Oklahoma.[2] The Creek Nation was granted the new land in fee simple with the right to perpetual self-government. Treaty of Feb. 14, 1833, United States-Creek Nation, art. II, 7 Stat. 418-419; Treaty of Aug. 7, 1856, United States-Creek and Seminole Tribes, arts. II-IV, 11 Stat. 700. Following the Civil War, the United States required the Creeks to cede the western portion of their territory as a penalty for the Tribe's alliance with the Confederacy, but the Tribe's title to the remaining portion of the territory was reaffirmed. Treaty of June 14, 1866, United States-Creek Nation, art. III, 14 Stat. 786.

By 1890, when Oklahoma Territory was created adjacent to Indian Territory (Act of May 2, 1890, ch. 182, 26 Stat. 81), would-be settlers were strongly pressuring Con-

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[1] The Creek Nation obtained the start-up capital for its bingo operations from Indian Country, U.S.A., a limited partnership, of which ICUSA, Inc. is the general partner. Under the management agreement between ICUSA, Inc. and the Creek Nation, the capital investment is recovered from bingo profits (Pet. App. A41-A42 & n.10). The tribal share of the bingo profits is used to pay for medical services for tribal members (*id.* at A25). In addition, the operation assists tribal members by providing needed employment opportunities: 80% of Creek Nation Bingo employees are Creeks, and less than 10% of those tribal employees had prior jobs (*ibid.*).

[2] The Creeks and four other tribes (the Cherokees, Seminoles, Chicasaws, and Choctaws), collectively referred to as the Five Tribes or Five Civilized Tribes, were removed to land west of the State of Arkansas. Their lands were collectively referred to as Indian Territory, even though no territorial government was ever established there.

gress to open Indian Territory to settlement, and to unite the two territories as a state. See *Harjo* v. *Kleppe*, 420 F. Supp. 1110, 1121-1122 (D.D.C. 1976), aff'd, 581 F.2d 949 (D.C. Cir. 1978) (describing the history of federal legislation dealing with the Creek Nation). Congress responded by creating the Dawes Commission to negotiate with the Five Tribes to extinguish tribal land title and develop an allotment plan.[3] Appropriations Act of Mar. 3, 1893, ch. 209, § 16, 27 Stat. 645. For several years the Five Tribes refused to deal with the Dawes Commission. In 1898, Congress enacted the Curtis Act, which provided for forced allotment and eventual termination of tribal land ownership without tribal consent unless the Five Tribes agreed to allotment plans. Ch. 517, §§ 11, 30, 30 Stat. 497, 514. The Creek Nation eventually agreed to allotment of "[a]ll lands of said tribe" except town sites and lands reserved for Creek schools and churches, railroads, and town cemeteries. Act of Mar. 1, 1901 (Creek Agreement), ch. 676, §§ 2, 3, 24, 31 Stat. 862, 868-869; Act of June 30, 1902 (Supplemental Creek Agreement), ch. 1323, 32 Stat. 500. In preparation for the unificiation of Indian Territory with Oklahoma Territory, the agreement provided that the Creek tribal government would be dissolved by March 4, 1906. Creek Agreement § 46, 31 Stat. 872.

Difficulty in completion of the tribal rolls and resistance to the allotment process prevented the anticipated demise of the Five Tribes, and, on April 26, 1906, Congress extended indefinitely the tribal existence and tribal governments of each of the Five Tribes. Act of Apr. 26, 1906 (Five Tribes Act), ch. 1876, § 28, 34 Stat. 148. See

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[3] The Five Tribes had been excluded from the General Allotment Act of 1887, ch. 119 § 8, 24 Stat. 391, which provided for the allotment of Indian reservations and opening of the remaining land to non-Indian settlement.

Harjo v. *Kleppe*, 420 F. Supp. at 1128-1129 (describing legislative history of the Five Tribes Act). The Five Tribes Act also provided that, upon dissolution of the tribes, title to unallotted tribal land "shall not become public lands nor property of the United States" but shall be held in trust by the United States "for the use and benefit of the Indians respectively comprising each of said tribes" (§ 27, 34 Stat. 148). The Creek Nation government was never dissolved and the Creek Tribe has remained in existence (*Harjo* v. *Kleppe*, 420 F. Supp. at 1129-1143).

The Oklahoma Enabling Act of June 16, 1906, ch. 3335, 34 Stat. 267, provided for the creation of the State of Oklahoma from Oklahoma Territory and Indian Territory. The authority of the United States over Indians within the two territories was expressly retained (§ 1, 34 Stat. 267-268).[4]

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[4] The jurisdiction received by the federal and state courts in eastern Oklahoma when the State was created also reflects the unique history of the former Indian Territory. When the Five Tribes were first removed to Indian Territory in the 1830's, each tribe established its own government, including a judicial system, within its respective nation in the Territory. But the tribal courts had no criminal jurisdiction over non-Indians, and Indian Territory became a refuge for criminals from neighboring states. See *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 197-200 (1978). Congress accordingly established by the Act of Mar. 1, 1889, ch 333, § 1, 25 Stat. 783, a United States court having exclusive original jurisdiction over most criminal offenses against the laws of the United States committed within Indian Territory. Controversies between Indians were expressly excluded from the court's jurisdiction. The jurisdiction of the United States court in Indian Territory was enlarged by the Act of May 2, 1890, ch 182, § 29, 26 Stat. 93, to include all civil suits except those within the exclusive jurisdiction of the tribal courts. The federal court thus had jurisdiction over disputes between Indians and non-Indians, and between Indians of different tribes.

While the Dawes Commission was attempting to negotiate the extinguishment of tribal land title and the allotment of tribal land, the

3. The Creek Nation and ICUSA, Inc. (the operator of Creek Nation Bingo) brought this suit for declaratory and injunctive relief to prevent the State of Oklahoma from seeking to collect state sales and use taxes on the Creek Nation Bingo sales activities and from seeking to enforce state laws regulating bingo.[5]

The district court found that the Mackey site, where Creek Nation Bingo is located, was part of the lands originally granted by the United States to the Creek Nation by the Treaty of February 14, 1833, and later retained

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tribal courts of the Five Tribes were stripped of their jurisdiction over suits involving their tribal members by the Appropriations Act of June 7, 1897, ch. 3, 30 Stat. 83, which gave the United States court in Indian Territory exclusive jurisdiction over all civil and criminal causes involving all persons and property in Indian Territory "irrespective of race." This provision was justified as necessary to provide the Indians with a substitute for the allegedly corrupt and incompetent tribal court systems in Indian Territory. See, *e.g.*, H.R. Rep. 1102, 54th Cong., 1st Sess. (1896); S. Doc. 182, 54 Cong., 1st Sess. 22-24 (1896); 29 Cong. Rec. 2349-2355 (1897). Finally, Section 28 of the Curtis Act, ch. 517, 30 Stat. 504-505, abolished the tribal courts (except for the Seminole tribal courts), transferring pending actions to the United States court in Indian Territory. At statehood, the Oklahoma Enabling Act of June 16, 1906, ch. 3335, 34 Stat. 267, provided for the transfer of federal cases from the United States court in Indian Territory to the newly created United States District Court for the Eastern District of Oklahoma (§ 16, 34 Stat. 276). All other cases were to be transferred to the courts of the newly created State.

[5] The State of Oklahoma does not prohibit bingo, but licenses and regulates it. Okla. Stat. Ann. tit. 21, §§ 995.1-995.18 (West 1983 & Supp. 1988). Creek Nation Bingo does not comply with state limitations on the fequency of operation, the size of prizes, or the ban on individual profit-making. See Pet. App. A7; Tr. 73 (David Moss testimony). Petitioner does not claim in this Court any authority to prohibit, license or directly regulate Creek Nation Bingo. See *California* v. *Cabazon Band of Mission Indians*, No. 85-1708 (Feb. 25, 1987).

by the Creek Nation under the Treaty of June 14, 1866, and that the tract had never been allotted (Pet. App. A36, A39-A41). The district court also found that title to the Mackey site had been quieted in the Creek Nation by decree of the United States District Court for the Eastern District of Oklahoma in 1925, and that the heirs of Louisa Mackey, whose allotment is adjacent to the tract, have no interest in the Mackey site (*id.* at A40). Because the State of Oklahoma had been an intervenor in the quiet title suit, the district court held the 1925 decree to be res judicata between the Creek Nation and the State on the issue of the Creeks' title to the Mackey site (*id.* at A40, A41 n.9). The district court concluded that the Mackey site is still in Creek tribal ownership and therefore is "Indian country" under 18 U.S.C. 1151(a) (Pet. App. A41).

The district court held that the State's exercise of tax or regulatory jurisdiction over the Creek Nation Bingo activities is preempted in two ways. First, to the extent the sales tax laws impose liability on the Creek Nation as a taxpayer, including liens on the taxpayer's property, those taxes are preempted by federal law (Pet. App. A44-A51). Second, by attempting to tax and regulate activities conducted entirely on tribal land, the State impermissibly interferes with the Tribe's ability to exercise its sovereign functions (*id.* at A44, A52-A54). The district court found that the State's regulation and taxation would "substantially reduce the revenues and economic benefits currently realized by the Creek Nation" and would "impede [the Creek Nation's] ability to carry out its legitimate and paramount concerns of self-sufficiency and economic development" (*id.* at A53).

The district court also held (Pet. App. A54) the Creek Nation Bingo building exempt from state use taxes as a permanent improvement on tax-exempt tribal land.

Mescalero Apache Tribe v. *Jones*, 411 U.S. 145, 158-159 (1973).[6]

4. The court of appeals affirmed the district court's judgment that state regulation and taxation of Creek Nation Bingo are preempted as impermissible interference with tribal sovereignty and federal Indian policies.[7] The court of appeals rejected the State's assertion that the Mackey site is not Indian country because the Creeks had been granted the land in fee simple and had never had a "reservation" as such in Indian Territory (Pet. App. A8-A11). Despite the "unusual nature of Creek Nation title" to the Mackey site, the court of appeals held that Congress clearly expressed its intent that certain land—including the Mackey site—be set apart for the Creeks (*id.* at A9-A11).[8]

The court of appeals reviewed the history of Creek tribal and federal jurisdiction in Indian Territory (Pet. App. A13-A22), and concluded that neither the federal laws enacted prior to Oklahoma's statehood nor the Oklahoma Enabling Act had abolished the Creek Nation's au-

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[6] The district court held that it had jurisdiction over the Creek Nation's suit to enjoin collection of the state taxes under 28 U.S.C. 1362, but that the Tax Injunction Act, 28 U.S.C. 1341, barred the suit of ICUSA, Inc. to enjoin collection of the state taxes; the latter was dismissed as a party (Pet. App. A54-A55).

[7] The court of appeals also affirmed the district court's dismissal of the suit by ICUSA, Inc. against the Oklahoma Tax Commission, but reversed the district court's dismissal of ICUSA, Inc. as a party (Pet. App. A32-A33).

[8] The court of appeals noted that it would be "anomalous" to adopt the State's position that the treaties conferring on the Creek Nation fee simple title—a title "*stronger*" than the mere right of occupancy with title in the United States typical for reservations—would result in a tribal land base with "*less* protection" than a reservation (Pet. App. A12).

thority over its tribal lands or had granted the State the power to tax or regulate tribal activities on tribal land (*id.* at A10-A11, A21-A22).

The court of appeals rejected the State's analogy between its sales taxes on bingo and the sales and excise taxes on cigarettes imported onto the reservation for resale to non-members of the tribe, approved by this Court in *Moe* v. *Confederated Salish & Kootenai Tribes,* 425 U.S. 463 (1976), and *Washington* v. *Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1980) (Pet. App. A26-A32). In applying the "particularized inquiry into the nature of the state, federal, and tribal interests at stake" required by *White Mountain Apache Tribe* v. *Bracker,* 448 U.S. 136, 145 (1980), the court of appeals found a strong federal interest in promoting and assisting tribal development of bingo operations to reduce tribal dependency on federal assistance (Pet. App. A29-A30). The court of appeals also found a strong tribal interest in the bingo operations as a "product" that was "wholly created, sold, and consumed within the boundaries of Creek Nation lands" (*id.* at A30). Finally, the court of appeals found that the state interest in raising revenue by taxing the bingo operation was weak, particularly since, unlike the cigarette sales cases, bingo customers were traveling onto Creek land not in order to avoid sales taxes but to purchase a product—high stakes bingo—not found elsewhere in the area (*ibid.*).[4] Moreover, the State provided no services to the Mackey site that would justify the tax (*id.* at A32). The court of appeals noted that the imposition of the sales tax would burden the tribal enterprise by increasing the total cost of playing bingo and by

[4] The court of appeals noted that, unlike the cigarette sales cases in which the state lost tax revenue it would otherwise have received, the evidence at trial had shown that the overall effect of Creek Nation bingo on the state and local economy was positive (Pet. App. A30).

imposing collection, remittance, and record-keeping requirements on the Tribe (*id.* at A31). While the court of appeals acknowledged that those burdens might not be great, it concluded that they were sufficient to warrant preemption of the tax because the State's interest in imposing the burdens on the Tribe was minimal (*id.* at A31-A32 & n.9).

The Oklahoma Tax Commission subsequently filed a petition for a writ of certiorari.[10]

DISCUSSION

1. As this Court recently reiterated in *California* v. *Cabazon Band of Mission Indians,* No. 85-1708 (Feb. 25, 1987), slip op. 3 (citations omitted), "[t]he Court has consistently recognized that Indian tribes retain 'attributes of sovereignty over both their members and their territory,' and that 'tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States.' It is clear, however, that state laws may be applied to [Indians and their territory] if Congress has expressly so provided." Here, the question is whether, in light of the history of Indian Territory summarized above, there has been the necessary expression of congressional intent to permit the application of the state law at issue to the Mackey site.

Land that is within the definition of "Indian country" in 18 U.S.C. 1151 is subject to tribal and federal, rather than state, jurisdiction.[11] Section 1151 includes, inter alia,

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[10] The other state defendant, David Moses, the District Attorney for Tulsa County, Oklahoma, has not sought a writ of certiorari from the court of appeals' judgment.

[11] Although the definition expressly refers only to criminal jurisdiction (18 U.S.C. 1152), this Court has recognized that it applies as well to civil jurisdiction. *Cabazon,* slip op. 4 n.5; *DeCoteau* v. *District County Court,* 420 U.S. 425, 427 n.2 (1975), and cases there cited.

"all land within the limits of any Indian reservation under the jurisdiction of the United States government," and all Indian allotments (including those outside a reservation) to which Indian title has not been extinguished. The Mackey site is on land granted to the Creek Nation in fee simple by the Treaty of February 14, 1833, and reconfirmed by the Treaty of June 14, 1866. It has never been allotted, and thus has remained in Creek tribal ownership.[12]

The courts below correctly analyzed the complex history of congressional dealings with the Creek Nation and its land and concluded that the Mackey site should be considered Indian country. This highly fact-specific determination, which is fundamental to the resolution of the issues presented by petitioner, does not warrant review by this Court.[13]

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[12] Petitioner challenges the district court's finding (Pet. App. A40-A41), affirmed by the court of appeals (*id.* at A10), that the Mackey site was never allotted and has remained in Creek tribal ownership. Petitioner contends (Pet. 7-8) that the district court erred in relying on a 1925 judgment quieting title to the Mackey site in the Creek Tribe against the heirs of Louisa Mackey, because the judgment was based on a settlement agreement in a dispute over oil and gas royalties rather than on a determination by the earlier district court that the Mackey site had always been in tribal ownership. The district court's reliance in the instant case on the prior quiet title judgment was based on an examination of the extant record in the earlier case. There is no reason for this Court to review the concurrent factual findings of both courts below on this point. See *Tiffany Fine Arts, Inc.* v. *United States,* 469 U.S. 310, 318 n.5 (1985), and cases there cited.

Moreover, the district court found (Pet. App. A40, A41 n.9) that the State of Oklahoma, as a defendant intervenor in the 1925 quiet title suit, was precluded from relitigating the Creek Nation's title to the Mackey site. Thus, the State's contention (Pet. 7) that the Mackey site had been allotted to Louisa Mackey is foreclosed by the prior decree.

[13] The court of appeals' analysis applies only to unallotted Creek tribal land. See note 14, *infra.* We are informed by the Department

Before considering whether the Mackey site is, as petitioner contends (Pet. App. A8-A10), part of a "disestablish[ed] reservation," it is first necessary to determine whether the Creek land in eastern Oklahoma has ever been part of a "reservation" as that term is used in Section 1151. Although the territory granted to the Creek Nation in fee simple by the Treaty of February 14, 1833, and the Treaty of August 7, 1856, was not referred to as a reservation, the court of appeals correctly noted (Pet. App. A8-A9) that no such formal designation is required: "for purposes of defining Indian country, the term [reservation] simply refers to those lands which Congress intended to reserve for a tribe and over which Congress intended primary jurisdiction to rest in the federal and tribal governments" (*id.* at A8). See, *e.g.*, *United States* v. *McGowan*, 302 U.S. 535, 538-539 (1938); *United States* v. *Chavez*, 290 U.S. 357, 364 (1933); *Solem* v. *Bartlett*, 465 U.S. 463, 468-469 (1984). Accordingly, land such as the Mackey site which has remained in tribal ownership since it was granted to the Creek Nation in 1833 is properly considered a "reservation."

Petitioner does not dispute the original existence of a Creek "reservation"; it contends instead (Pet. 8-9) that the Curtis Act and the Creek Agreement disestablished the Creek reservation and terminated the "Indian country" status of any remaining, unallotted tribal land. Applying the principles of this Court's decisions, the court of appeals correctly held that the remaining unallotted Creek tribal land was not divested of Indian country status (Pet.

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of the Interior that there is very little land remaining in Oklahoma that, like the Mackey site, has been in continuous Creek Nation tribal ownership since 1833.

App. A10-A12, A15-A16).[14] While the Curtis Act expressed Congress's intention in 1898 that the Creek Nation (as well as the other Five Tribes) soon would be dissolved and all tribal lands allotted or otherwise removed from tribal ownership, and the Creek Agreement in 1901 expressly provided for the dissolution of the Creek tribal government by March 4, 1906, Congress, in fact, did not dissolve the Creek Tribe and instead provided in the Five Tribes Act for preservation of the tribal governments and the continued existence of all Five Tribes (*Harjo* v. *Kleppe,* 420 F. Supp. at 1129-1143; see also *Creek Nation* v. *United States,* 318 U.S. 629, 638 (1943)). In this setting, the general expectation of Congress at the turn of the century that tribal ownership of land in Indian Territory would be superseded by allotment and that the Five Tribes would be dissolved is a manifestly insufficient basis from which to "extrapolate * * * a specific congressional purpose of diminishing reservations" (*Solem,* 465 U.S. at 468-469). Diminishment or termination of reservation status "will not be lightly inferred" (*id.* at 470). Once a block of land is set aside for an Indian reservation, the "entire block retains its reservation status until Congress explicitly indicates otherwise" (*ibid.*).[15]

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[14] Since unallotted tribal lands "generally remain Indian country despite disestablishment" (Pet. App. A10 n.3 (citations omitted)), the court found it unnecessary to consider the validity of petitioner's disestablishment argument as applied to allotted Creek land, or to other non-tribal lands within the boundaries of the Creek Nation (*id.* at A19 n.5). See pages 14-15, *infra.*

[15] Here, the provisions of the Creek Agreement and the Five Tribes Act show no intention to divest unallotted Creek tribal land of Indian country or reservation status. Unlike the surplus land Act that terminated the Lake Traverse Reservation in *DeCoteau* v. *District County Court, supra,* the Creek Agreement included no provision for cession, sale, relinquishment, or conveyance of unallotted land to the United States. Cf. *DeCoteau,* 420 U.S. at 445-446. In fact, the Creek Agreement made no provision for "surplus lands" as such. The agree-

Indeed, even if Congress had disestablished or terminated the "reservation" status of all Creek Nation lands, the retained Creek tribal land could well remain Indian country for purposes of preemption of state taxing authority. As the court of appeals noted (Pet. App. A10 n.3), the decisions of this Court interpreting surplus land Acts have dealt with whether *non-Indian* unallotted land within the borders of an original Indian reservation remained Indian country. See *Solem* v. *Bartlett, supra; Rosebud Sioux Tribe* v. *Kneip,* 430 U.S. 584 (1977); *DeCoteau* v. *District County Court, supra; Mattz* v. *Arnett,* 412 U.S. 481 (1973); *Seymour* v. *Superintendent,* 368 U.S. 351 (1962). Land such as the Mackey site, which, after completion of the allotment process, still remained in

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ment simply provided that the tribal lands were to be "allotted among the citizens of the tribe * * * so as to give each an equal share of the whole in value" (§ 3, 31 Stat. 862), except for the reservation of land for townsites or specified public buildings or uses (§§ 3, 18, 24, 31 Stat. 862, 867, 868). In contrast, the General Allotment Act, ch. 119, § 5, 24 Stat. 389-390, by which the Lake Traverse Reservation in *DeCoteau* had been allotted, provided that, once a reservation had been allotted, the Secretary of the Interior could negotiate with the tribe for purchase of the remaining, unallotted lands. Even more clearly dispositive of the issue of Congress's intention as to the unallotted Creek land is the Five Tribes Act which, first, continued the tribal existence of the Five Tribes (including the Creek Nation), and second, provided that, upon the dissolution of the Five Tribes (§ 27, 34 Stat. 148),

> the lands belonging to the [Five Tribes] * * * shall not become public lands nor property of the United States, but shall be held in trust by the United States for the use and benefit of the Indians respectively comprising each of said tribes * * *.

Implicit in this provision is Congress's assumption that the Five Tribes had at the time of enactment retained ownership of land, as well as Congress's intention that such unallotted land would remain tribal land until the tribes were dissolved. The Creek Nation was never dissolved and the unallotted Mackey site has remained tribal land.

tribal ownership, may well meet the definition of Indian country in *United States* v. *Pelican,* 232 U.S. 442, 449 (1914): land "validly set apart for the use of the Indians as such, under the superintendence of the Government." See also *United States* v. *John,* 437 U.S. 634, 649 (1978) (applying the above-quoted definition). This conclusion is supported by the fact that allotted land remaining in individual Indian ownership retains Indian country status, even when the reservation of which the allotments were a part has been entirely terminated (18 U.S.C. 1151(c); *DeCoteau,* 420 U.S. at 446-447); it would be anomalous for land remaining in tribal ownership after disestablishment of a reservation not to retain Indian country status as well.[16]

2. The second issue presented by the petition is also highly fact-specific. The court of appeals and the district court recognized that the validity of the state sales tax as applied to tribal activity on the Mackey site must be determined by application of the preemption analysis established by this Court in *White Mountain Apache Tribe* v. *Bracker,* 448 U.S. 136, 145 (1980) and *California* v. *Cabazon Band of Mission Indians,* No. 85-1708 (Feb. 25, 1987), requiring a "particularized inquiry into the nature of the state, federal, and tribal interests at stake" (*Bracker,* 448 U.S. at 145). See also *Ramah Navajo School Bd., Inc.*

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[16] Another potentially complicating factor in determining the boundary line between state, federal, and tribal jurisdiction in eastern Oklahoma is the unique history of the successive limitations on the jurisdiction of the tribal courts of the Five Tribes. See note 4, *supra.* We do not, however, believe that factor is significant in the particular context of this case, which involves only the scope of the state's taxing authority, rather than questions of judicial jurisdiction or even the scope of the state's authority to enforce its criminal laws. Cf. *Cabazon,* slip op. 4-5; *Bryan* v. *Itasca County,* 426 U.S. 373 (1976).

v. *Bureau of Revenue,* 458 U.S. 832, 838-839 (1982) (Pet. App. A28-A29). Under this approach, " '[s]tate jurisdiction is pre-empted * * * if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.' " *Cabazon,* slip op. 13 (quoting *New Mexico* v. *Mescalero Apache Tribe,* 462 U.S. 324, 334 (1983)). The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, which "encompasses far more than encouraging tribal management of disputes between members, but includes Congress' overriding goal of encouraging 'tribal self-sufficiency and economic development.' " *New Mexico* v. *Mescalero Apache Tribe,* 462 U.S. at 335 (quoting *Bracker,* 488 U.S. at 143 (footnote omitted)).

State interference with the federal objective of furthering tribal self-government by the imposition of additional burdens on a tribal enterprise "must ordinarily be justified by functions or services performed by the State in connection with the on-reservation activity" (*New Mexico* v. *Mescalero Apache Tribe,* 462 U.S. at 336). In the area of taxes, a state "must point to more than its general interest in raising revenues" *ibid.*; accord, *Ramah Navajo,* 458 U.S. at 839, 845; *Bracker,* 448 U.S. at 150).[17] The state

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[17] Moreover, as this Court noted in *Cabazon* (slip op. 11-12 n.17 (citation and emphasis omitted)), "the federal tradition of Indian immunity from state taxation is very strong and * * * the state interest in taxation is correspondingly weak. * * * '[I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing * * * Indian income from activities carried on within the boundaries of the reservation.' " Petitioner attempts to avoid this "*per se* rule" (*ibid.*) by claiming that the incidence of the tax here is formally on the customers of Creek Nation Bingo, and not directly on the Tribe. The district

interest in imposing a tax is strongest when: (1) the tax is directed at off-resevation value; and (2) the taxpaper is a recipient of state services. *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 157 (1980).

Petitioners do not here dispute that *Cabazon* prevents Oklahoma from applying its regulatory standards to Creek Nation Bingo, and nothing in the record of this case establishes any special factor justifying the imposition of state taxes on that operation. Accordingly, it was reasonable for the courts below to conclude that the principles of *Cabazon* prevent the exercise of state taxing authority asserted by petitioners.[18] In any event, we

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court rejected that claim (Pet. App. A44-A51); although the court of appeals agreed that the incidence of the tax was not on the Tribe (*id.* at A26-A28), it nevertheless found the tax preempted after balancing the competing interests of the state and the Tribe (*id.* at A30-A32). Cf. *California State Bd. of Equalization* v. *Chemehuevi Indian Tribe*, 474 U.S. 9 (1985).

[18] The question of state authority to tax customers of Indian bingo operations was not involved in *Cabazon*. The court there did, however, recognize the strong federal and tribal interests in promoting such operations (slip op. 15-17). The record here similarly shows that Creek Nation Bingo is an important source of tribal income and employment (Pet. App. A25, A53; Tr. 83, 90-91). The court below distinguished *Coleville* and the related "smokeshop" cases (*e.g.*, *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976)), permitting state taxation of Indian sales to non-members of cigarettes imported onto the reservation (Pet. App. A30-A32). In contrast to the "smokeshop" cases, the value generated from Creek Nation Bingo is created on tribal lands by the activities of the Creek Nation. See *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. at 343. Creek Nation Bingo is not marketing a tax exemption or undermining the state tax base, but is providing a service not available outside of tribal boundaries—high stakes bingo.

submit that, because of its unusual facts, this is not an appropriate case for consideration by this Court of the scope of state taxing authority over on-reservation activities. Creek Nation Bingo is run on a discrete, non-residential tribally owned site, not part of a typical Indian reservation; moreover, petitioner does not contend that the State provides governmental services to the Mackey site itself,[19] but instead asserts that the non-member bingo customers receive no "governmental services" from the tribe.[20] This operation thus does not represent a reasonably typical situation of an Indian-operated enterprise, appropriate for the development of generally useful principles governing the scope of state taxing authority.

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[19] While off-reservation effects of on-reservation activities may warrant assertion of some types of state jurisdiction (*New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. at 343; *Colville*, 447 U.S. at 163-164), the State in this case has not sought to justify its taxation of Creek Nation Bingo by pointing to any additional burdens or costs incurred as a result of the bingo operation. Rather, petitioner seeks to justify taxation of Creek Nation Bingo sales based entirely on the governmental services ordinarily provided the bingo customers when they are outside the tribal boundaries.

[20] The testimony did show that the Creek Nation, through its agent ICUSA, Inc., supplies a security force to protect the customers while they are on tribal land, provides a first aid station for the customers' emergency medical needs, and furnishes all water and sewer services for the bingo hall from wells and a septic system located on the tribal land (Tr. 433-435).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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